Supreme Court, U.S.
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No. 96-43

IN THE

Supreme Court of the United States

October Term, 1995

DAVID L. WILKINSON,

Petitioner,

v.

LEGAL SERVICES CORPORATION
And The UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner David Wilkinson replies as follows to the Brief of Legal Services Corporation In Opposition To Petition For A Writ Of Certiorari ("LSC Opp."). The Solicitor General elected not to submit any response to the petition.

1. LSC's view of constitutional estoppel, broader even than that embraced by the court of appeals, demonstrates the state of confusion the doctrine is now in. For example, LSC seeks to justify its application in this case based on a wide range of actions by Petitioner, as Inspector General, while recess-appointed boards were running the corporation. LSC Opp., pp. 6-8, 12, 16. These include requesting funds needed to set up the Office of Inspector General ("OIG"); proposing to expand the OIG professional staff; seeking authorization to hire personnel, including a staff auditor; and submitting "various memoranda of understanding governing relations between the OIG and various LSC departments" as well as budget material. The court below did not rely on any of those actions as grounds for estoppel but based its decision solely on Petitioner's personal receipt of compensation and new employment benefits.[1] A6-A7.

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[1] Petitioner did not need (and did not request) any action by the recess-appointees to authorize his own salary, since he had a contractual right to be paid for his services. LSC erroneously states that Petitioner requested salary increases and personal benefits for himself from the recess-appointees (LSC Opp. at i, 5, 16); there is no support for that in the record, and it did not happen. Petitioner also had a right to stay on as Inspector General under his employment contract, unless the LSC board affirmatively acted by a certain date each year to discontinue the arrangement. (A12). Thus, the court of appeals was wrong in implying that an affirmative decision would have had to be made by the recess-appointed board for Petitioner to keep his job from one year to the next. (*See* A7).

LSC simply ignores the fact that Petitioner had a signed contract of employment as the corporation's first Inspector General, obligating him to do just the kinds of things it lists. There is no dispute that Petitioner was duly appointed to that position under a board which had been lawfully appointed, with Senate confirmation, pursuant to the statute. What was Petitioner supposed to do when recess-appointees arrived and took command? To whom should he have reported, in light of OMB's ruling that the board of directors was the "head" of LSC for purposes of the Inspector General Act?

LSC's version of constitutional estoppel would place everyone doing their jobs at risk of forfeiting the personal right to challenge supervisors' legal authority. Under the LSC theory, Petitioner's only "safe" course — had he then known or suspected that the directors were illegally appointed and might some day undertake to fire him — would have been to stop performing the duties of his position and contest their authority. Perhaps the D.C. Circuit's approach would allow Petitioner to continue working without losing the opportunity to dispute the directors' authority, but not to receive compensation — an equally irrational result.

Illustrating the illogic and perplexity which surrounds constitutional estoppel even among sophisticated practitioners (and jurists), the LSC brief underscores why review should be granted. Only this Court can provide the needed clarification of this unevenly-applied, judge-made doctrine, which was used here to foreclose the resolution of important legal issues duly raised by a plaintiff with undoubted Article III standing.

2. *Arnett v Kennedy*, 416 U.S. 134, 153 (1974), correctly described the purpose of constitutional estoppel and its

uncertain application, but little else in that case remains good law. Specifically, the "bitter-with-the-sweet" concept seized on by LSC from the plurality opinion in *Arnett* — that one who receives benefits under a government program "must take the bitter with the sweet" and thus loses the right to attack procedural deficiencies of the program — has been expressly repudiated in more recent decisions of this Court. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 540-41 (1985). LSC's heavy reliance on *Arnett* (LSC Opp., pp. 13-15) is misplaced and highlights the difficulty faced by LSC in defending the decision below on its own terms.

3. In an ironic twist, LSC now objects that Petitioner failed to argue in the court of appeals that passive receipt of benefits is not a sufficient basis for estoppel. LSC Opp. at 13. However, since neither of the appellants below mentioned the defense of constitutional estoppel in their briefs or in oral argument, nor cited any cases or authority involving the doctrine, there was no reason for Petitioner to address it at all. Instead, the issue was raised *sua sponte* by the court of appeals **after** briefing and argument was completed. (A10).[2]

In any event, as soon as the matter was raised by the panel, Petitioner did unmistakably claim that constitutional estoppel does not apply to this case. *See* Post-Arg. Mem. For Appellee, filed Feb. 23, 1996, D.C. Cir. No. 95-5144, at 3. Contrary to LSC's view, this Court's jurisprudence does not

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[2] The court requested simultaneous submissions concerning, *inter alia*, "the equitable estoppel argument implied in the Corporation's brief," directing the parties to "indicate the applicability, if any, of *Robertson v. FEC*, 45 F.3d 486, 489-90 (D.C. Cir. 1995)." (A10). No opportunity was provided for Petitioner to respond to LSC's submission on this issue.

require all ***arguments*** supporting a claim to be made in the appellate court. Rather, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron v. National R.R. Passenger Corp.*, 130 L.Ed. 2d 902, 909 (1995), *quoting Yee v. Escondido*, 118 L.Ed. 2d 153, 169 (1992). Moreover the court of appeals not only raised the issue but passed upon it, holding that Petitioner's mere receipt of compensation and employment benefits was enough to apply constitutional estoppel under *Robertson*. (A6-A7). There was no waiver or omission below that would bar Petitioner's argument in this Court. *See Lebron*, 130 L.Ed. 2d at 909; *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991).

4. The fact that Petitioner did not contest the authority of LSC's recess-appointed directors before they voted to separate him is immaterial.[3] As its inspector general, Petitioner did not hold a legal position at LSC, and there is no evidence that Petitioner was even aware at the time that the recess appointments were of dubious validity. The court of appeals flatly rejected LSC's theory that Petitioner was

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[3] LSC wrongly implies that Petitioner first questioned the directors' appointments in this lawsuit (LSC Opp. at 4); however, its counsel correctly represented to the court of appeals that the appointments issue was discussed between the parties' counsel many months before it was asserted in the litigation. *See* Letter from Shapiro and Olander to Clerk of the D.C. Circuit, Feb. 23, 1996. Of course, LSC's general counsel and some directors were well aware of the lurking question. The possible invalidity of the directors' appointments was obviously not "inside information" which Petitioner somehow misappropriated for his own personal gain, contrary to LSC's silly suggestion. (LSC Opp. at 21).

obligated to give advance notice of his claim that the directors' appointments were defective. Because there was nothing the directors could have done to remedy the situation, the court held, any such notice would have been pointless. (A5).

CONCLUSION

By illustrating how muddled and confusing the law of constitutional estoppel has become, the brief in opposition strengthens the case for review by this Court. Clearly the issue is an important one for constitutional adjudication — especially when the doctrine is used as a bar to Appointments Clause challenges, which have special significance in our federal system. *See Freytag v. Commissioner*, 501 U.S. 868, 880 (1991). A writ of certiorari should be issued to review the decision of the court of appeals.

Respectfully submitted,

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